No. 22,709

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

N. A. DEGERSTROM, INC. & BOWER MACHINERY CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANT

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I N D E X

CITATIONS

Cases:

Cases: Page

Statutes:

Miscellaneous:

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JURISDICTIONAL STATEMENT

The appellee, N. A. Degerstrom, Incorporated, brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for property damage allegedly caused by the negligence of a government employee. On September 18, 1967, the district court entered judgment for Degerstrom (I.R. 59); [1] this judgment was modified on November 2,

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1/ "I.R." refers to the Transcript of Record reproduced by the Clerk; "II.R." refers to the "Record of Proceedings at the Trial", which is Volume II of the record on appeal.

1967 (I.R. 69), and a notice of appeal was filed on December 29, 1967 (I.R. 71). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action against the United States for damage to a piece of heavy equipment. The equipment, a Model 988 loader, was owned by Bower Machinery Company and leased to the appellee, N. A. Degerstrom, Incorporated (hereafter the "Contractor") (I.R. 44).[2/] The Army Corps of Engineers then leased the equipment, with operator, from the Contractor for flood emergency work near Colfax, Washington (I.R. 23). The parties executed the standard plant and equipment lease agreement, which contained the following provision, known as Article 5 (I.R. 5):

> Contractor's Responsibility. The Contractor shall be responsible that his employees strictly comply with all Federal, State, and municipal laws that may apply to operations under the contract; and it is understood and agreed that the Contractor assumes full responsibility for the safety of his employees, plant, and materials and for any damage or injury done by or to them from any source or cause, except damage caused to plant or equipment by acts of the Government, its officers, agents or employees, in which event such damage will be the responsibility of the Government in accordance with applicable Federal laws.

While at the site of the flood control work, the Contractor's operator (McKelvy) dropped the loader on a rock in

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2/ Bower was made a nominal plaintiff below (I.R. 56); it is not involved in this appeal, since damages were only awarded to Degerstrom.

the bed of a stream and cracked the transmission case (I.R. 45). The Contractor then brought this action against the government for the cost of its repairs, contending inter alia that its operator was a "loaned servant" at the time the damage occurred, and that therefore the government was liable for his negligence (I.R. 38).

The district court found that McKelvy, the operator, was on the Contractor's payroll (I.R. 47), and that he was in fact "an employee of Degerstrom [the Contractor]" (I.R. 45, 49). 3/ It also found that "he was competent and possessed of the requisite skill and experience. * * * Mr. McKelvy knew the hazards involved, such as flooding the machine, high centering it or cutting the tires" (I.R. 45). With respect to the accident, the court found that the Corps of Engineers' employee in charge of the operation "told Mr. McKelvy to perform certain work including the removal of certain culverts and the piling of rocks along or upon the banks of the stream" (I.R. 69). "Mr. McKelvy was directed to work when and where Mr. Breckon of the Corps of Engineers told him to, but the operational details were left to Mr. McKelvy" (I.R. 70). The accident occurred while the loader was in the bed of the stream (I.R. 45). The operator indicated that he was not receiving any hand signals at the time of the accident (II.R. 117, 118).

3/ The original opinion also states that the operator's salary was paid by the United States (I.R. 50). At the request of the government (I.R. 63, par. 4), this finding was stricken by the court (I.R. 70, par. 4), since it was obviously in conflict with other portions of the opinion (see I.R. 47, 49).

The court below concluded that the damage to the loader occurred "as a direct and proximate result of negligence on the part of Ralph McKelvy," the operator of the machine (I.R. 58). It then held as a matter of law that the "loaned-servant" doctrine made the government liable for the negligence of the Contractor's operator (I.R. 58), presumably both under the terms of Article 5 of the lease agreement and independently of that provision.

SPECIFICATIONS OF ERRORS

1. The district court erred in failing to find that Article 5 of the lease agreement made the Contractor liable for the damage to its equipment caused by the negligence of the Contractor's operator, regardless of whether the operator was a "loaned servant" of the government.

2. The district court erred in holding that the Contractor's operator was a "loaned servant" of the government, and that therefore the government was liable for damages to the Contractor's equipment caused by his negligence.

ARGUMENT

Introduction

1. This Court need not reach the question whether the operator of the Contractor's equipment was a common law "loaned servant" of the government at the time of the accident. Under the terms of the lease agreement, the parties clearly contracted

to divide responsibility for any damage occurring during the term of the lease. Article 5 of that agreement provided that "the Contractor assumes full responsibility * * * for any damage or injury done by or to" his employees or equipment, "except damage caused to * * * equipment by acts of the Government, its officers, agents or employees * * * ." The obvious intent of this provision was to fix the Contractor's responsibility for damages caused by its employees, including the operators of its own equipment. Any other view would render the clause meaningless; its clear purpose was to prevent just the type of "loaned-servant" claim which appellee is asserting in this action.

2. Even absent Article 5 of the lease agreement, the operator of the Contractor's loader was not an "employee of the government" within the meaning of the Federal Tort Claims Act, 28 U.S.C. 2671, and the government cannot be held liable to the Contractor under that Act for damage to the Contractor's equipment caused by the negligence of this operator. As the district court correctly recognized (I.R. 49), federal law governs the question of who is an employee under the Act. Brucker v. United States, 338 F. 2d 427, 428 n. 2 (C.A. 9). And, under the applicable federal law and general agency principles, the lessor of equipment with operator, not the lessee, is liable for the negligence of the operator in these circumstances. See Standard Oil Co. v. Anderson, 212 U.S. 215; Restatement (Second), Agency § 227.

I. UNDER THE TERMS OF THE LEASE AGREEMENT, THE CONTRACTOR, NOT THE GOVERNMENT, WAS TO BEAR ANY LOSS CAUSED BY THE NEGLIGENCE OF THE OPERATOR OF THE CONTRACTOR'S EQUIPMENT.

Absent contract or statute, traditional tort law, under the doctrine of respondeat superior, holds a master liable for the torts of his employees while they are acting within the scope of their employment and subject to his control. See Restatement (Second), Agency §§ 219(1), 220(1). In a situation where an employer supplies an employee to another person, it is possible under certain circumstances for the employee to be deemed a "loaned servant" of the other person for purposes of fixing tort liability for a given act. Id., § 227. In a potential "loaned-servant" situation, it is of course possible for the two masters to agree to apportion liability on some other basis than traditional tort law. An examination of the lease agreement in the instant case, in which the Contractor leased a loader and operator to the Corps of Engineers to engage in certain flood-control work, shows that Article 5, entitled "Contractor's Responsibility," did provide for a different apportionment of risk than that found at common law. For this reason, the district court erred in incorporating the common law doctrine of "loaned-servant" liability into the contract, thereby completely abrogating its effect.

Article 5 provides, in pertinent part (emphasis added):

> [I]t is understood and agreed that the Contractor assumes full responsibility for the safety of his

employees * * * and materials and for any damage or injury done by or to them from any source or cause, except damage caused to * * * equipment by acts of the Government, its officers, agents or employees, in which event such damage will be the responsibility of the Government in accordance with applicable Federal laws.

Thus the Contractor by this provision assumed "full responsibility for the safety of his employees * * * and for any damage or injury done by * * * them" except where government officers, agents or employees caused the damage. The district court read the Contractor's responsibility for damage done by his "employees" as excluding responsibility for the operator of the leased machine. Instead the court held that this operator was an "employee" of the government, thus making the government liable for his negligent damage to the Contractor's equipment.

This reading is inconsistent with the plain intent of the parties. It is apparent that the only employee of the Contractor even remotely connected with this contract was the operator of the machine -- neither party had any reason to agree on tort liability for the actions of the Contractor's employees back in its shop. Therefore, the only "employee" who could conceivably be covered by the clause governing the Contractor's responsibility was this operator, if the clause is to be given any meaning at all. Conversely, without Article 5 the government would already be liable for the operator's torts under the "loaned-servant" doctrine, if applicable. Under the Contractor's reading of the

provision, this common law rule is merely incorporated into the lease agreement. Clearly, the restatement of this rule in every standard plant and equipment lease would be a total waste of effort. The provision should instead be read to accomplish its obvious purpose: to place the risk of loss on the Contractor for torts by the Contractor's regular employees, and on the government for torts of the government's regular employees. This interpretation would obviate the necessity of resolving each particular case of negligence by a leased operator to decide whether under all of the circumstances he had become a servant of the lessee with respect to the act of negligence involved. It is the only practical view of the provision and the only interpretation which accomplishes the plain intent of the parties; it should therefore be adopted by this Court.

Our view is also in accord with the plain meaning of the words of Article 5 itself. The parties used the word "employees," not "servants," both in the clause providing for the Contractor's responsibility and in the clause excepting acts of government "officers, agents or employees." If the "loaned-servant" doctrine was intended to be incorporated into the contract, it is reasonable to assume that the parties would have chosen the word "servants" to indicate this intent. The Restatement, supra, speaks in terms of loaned servants, not loaned employees. The cases also use this phraseology. See, e.g., New Orleans-Belize SS. Co. v. United States, 239 U.S.

202, 206; George A. Fuller Co. v. McCloskey, 228 U.S. 194, 202. Furthermore, the clause exempting acts of government employees also uses the words "officers" and "agents," which clearly refer to regularly employed personnel of the government. The word "employees" should be read in the same manner under the doctrine of ejusdem generis.

Other provisions of the lease agreement support our view that the term "employees" means regularly employed persons, without any dependence on the common law "loaned-servant" doctrine. Article 13(a) provides that "the Contractor will not discriminate against any employee because of race," etc. (I.R. 6; emphasis added). Under the theory of the Contractor in this case, its regular employees become employees of the government while on the job and under some government "control". This theory could be held to relieve the Contractor of its obligation under this clause (i.e., its obligation not to discriminate) during that time, a result clearly not intended by the parties to the agreement. Similarly, Article 12, providing that the Contractor must discharge "objectionable employees" (I.R. 6), plainly was intended to apply to all regular employees of the Contractor, and not to exclude those temporarily under the "control" of the government.

These examples of the contract language, standing alone and when viewed in the context of the purpose of Article 5, show that the parties intended a clear division between government employees -- such as contracting officers, Corps of

Engineers' officials, and others hired and paid by the government -- and the Contractor's employees brought to the job to operate the equipment (or supplied with the plant in plant-leasing situations). There was no intent that the same individual be shuttled back and forth between masters depending upon which clause of the agreement was being applied. The word "employees" has a consistent meaning throughout the agreement; there is no reason to incorporate the "loaned-servant" doctrine into Article 5, thereby making it inconsistent with the rest of the agreement. This is especially true in view of the fact that the parties in Article 5 intended to fix tort liability irrespective of the common law rules of respondeat superior. Therefore, although (as we will show below) the district court also erred in holding that McKelvy was a "loaned servant" of the government at the time of the accident, judgment for the government should have been granted on the basis of Article 5 of the lease agreement regardless of where common law tort liability would fall.

II. EVEN IF THERE WERE NO LEASE AGREEMENT, OR IF IT IS INTERPRETED TO INCLUDE THE CONCEPT OF THE "LOANED SERVANT", UNDER THE FACTS OF THIS CASE THE OPERATOR OF THE CONTRACTOR'S EQUIPMENT WAS NOT A "LOANED SERVANT" OF THE UNITED STATES AT THE TIME OF THE ACCIDENT.

As we pointed out above, the Contractor's interpretation of Article 5 of the lease agreement, which incorporates the common law doctrine of "loaned-servant" liability, renders the provision meaningless as an attempt to apportion responsibility

for tort liability arising during the term of the lease. However, we now show that, even under this interpretation (or indeed if there were no lease agreement, which is the practical effect of the decision below), the Contractor and not the government would be responsible for damages caused to the Contractor's equipment by the negligence of the Contractor's operator in the circumstances of this case.

The district court correctly held (I.R. 49) that federal law controls the issue whether an individual is an "employee of the Government" within the meaning of the Federal Tort Claims Act, 28 U.S.C. 2671. E.g., Brucker v. United States, 338 F. 2d 427, 428 n. 2 (C.A. 9), certiorari denied, 381 U.S. 937; LeFevere v. United States, 362 F. 2d 352, 353 (C.A. 5); Fisher v. United States, 356 F. 2d 706, 708 (C.A. 6), certiorari denied, 385 U.S. 819; Blackwell v. United States, 321 F. 2d 96, 98 (C.A. 5). And, under federal law and general agency principles as applied to circumstances of this case, the lessor of the equipment with operator is clearly responsible for the damage to its own equipment caused by the negligence of its own operator.

One of the leading cases in this area, Standard Oil Co. v. Anderson, 212 U.S. 215, involved the furnishing of a winch and operator by the defendant to a stevedoring company. "The winchman was hired and paid by the defendant, who alone had the right to discharge him." Id. at 219. Hand signals were given by the employees of the stevedore to help the winchman in his operation of the equipment; the injury involved (to an employee of the

stevedore) was caused by the negligent failure of the winchman to obey one of these signals. The Supreme Court held that the winchman was not a loaned servant of the stevedore, so that the injured employee could maintain a tort action against the winchman's general employer, the owner of the winch (212 U.S. at 226):

> Much stress is laid upon the fact that the winchman obeyed the signals of the gangman * * * . [But] the giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters.

This holding has been followed numerous times by the federal courts. See, e.g., George A. Fuller Co. v. McCloskey, 228 U.S. 194, 202-204; New Orleans-Belize SS. Co. v. United States, 239 U.S. 202, 206 ("Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person."); Geraghty v. Lehigh Valley R. Co., 70 F. 2d 300, 304 (C.A. 2) (general directions by "borrower" of train crew not enough to establish "loaned-servant" situation). Most state law is to the same effect. See, e.g., Radich v. United States, 160 F. 2d 616 (C.A. 9) (involving California law since it was not a Federal Tort Claims Act suit against the United States); Bartholomeo v. Charles Bennett Contracting Co., 245 N.Y. 66, 156 N.E. 98; Miller v. Woolsey, 240 Iowa 450, 35 N.W. 2d 584.

The instant case is far stronger on its facts against the application of the "loaned-servant" doctrine than the cases cited above. In those cases (and of course in cases holding the lessee liable)there was always some active participation by the alleged new master in the operation of the equipment, such as hand signals or detailed instructions. In the instant case, however, the operator testified (II.R. 117):

> There wasn't any signals. I just was making a trip. I had made several trips and this happened. I bumped this rock and caused the damage.

See also II.R. 118. The loader was some 75 feet from the Corps of Engineers supervisor when the accident occurred. Furthermore, the supervisor did not tell the operator "where to drive in the river * * * or how to operate the machine" (II.R. 46; see also II.R. 116, 120). It was the operator's decision whether to go into the river or use the access road at this particular time (II.R. 35). In these circumstances the government cannot be said to have had any control whatsoever over the actions of the operator beyond telling him where to pile the rocks. This much control would seemingly be present in every case where the borrowing party wants something done, but the cases are clear that only where considerably more control is present can the lessee

of equipment with operator be held responsible for the operator's negligence. 4/

General agency principles are in full accord with the proposition that a person in the general employ of one master does not become the servant of another merely because the latter has general authority to direct him as to the work to be done. The Restatement (Second), Agency § 227, comments b and c, set out the applicable factors (emphasis added):

> b. Inference that original service continues. In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it.
>
> c. Factors to be considered. Many of the factors stated in Section 220 which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer. Thus a continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist.

4/ McCollum v. Smith, 339 F. 2d 348 (C.A. 9), is not to the contrary. In that case the lessee told the operator, through hand signals, exactly where to place each beam being lifted by the rented crane. This Court held that such direction had "the force of a command." Id. at 351. The instant case is far removed from the McCollum situation. Furthermore, McCollum was apparently a diversity case, in which only the law of Hawaii and not federal law applied.

> A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality, and these may be opposed to the interests of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality. A person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise, permits his servant and instrumentality to assist another, is more apt to intend to surrender control.

Turning to the facts of the instant case, it is clear that all of the factors indicating that the general employer should be held liable for the actions of his employee are present here. The Contractor could of course substitute one operator for another at any time; indeed, he might sometimes be required to do so under the agreement (I.R. 6 -- Article 12). The time of employment was of short duration, estimated to be 100 hours (I.R. 12). The operator was found by the district court to have had the "skill of a specialist" (I.R. 45).

Continuing with the factors set out in comment c, supra, the machine and operator were rented together, precisely the example given in the comment, and the machine had the "considerable value" of $65,000 (I.R. 70, par. 8). The servant was

"expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire * * * ." The record is clear that McKelvy was only under instructions to obtain a certain result at the time of the accident, namely, "the removal of certain culverts and the piling of rocks along or upon the banks of the stream" (I.R. 69). "[T]he operational details were left to Mr. McKelvy" (I.R. 70; II.R. 46, 116, 120).

Finally, the Contractor was not a gratuitous citizen lending his government the use of his personal equipment for humanitarian purposes, but rather a corporation engaged in the business of operating heavy equipment (II.R. 112). Two valuable items, a tractor and the loader, were leased under this contract, including "operator, fuels, lubricants, and all other operating supplies," at a total price of $71.00 per hour (I.R. 12). The price paid by the government would ordinarily include insurance costs (II.R. 107), and presumably the Contractor was adequately insured. While the record does not indicate whether the Contractor ever rented other machines, the renting of these two items in these circumstances brings the case within the principles set out in the Restatement.

The application of these agency principles to the facts of this case thus demonstrates that the district court erred in holding that the Contractor "retained no control" over McKelvy (I.R. 50). Of course, the Contractor, like the Corps of Engineers, left the details of the job to the operator; but

this does not mean that the Contractor had no "control" for purposes of the "loaned-servant" rule. If the servant did not pass into the employ of the government at the time of the accident, the Contractor remained his master regardless of the fact that the operator himself controlled the details of the job. No one is contending that the operator became an independent contractor (of course, if this were true there could be no recovery from the government for his negligence).

The practical significance of the district court's holding would be truly anomalous. For example, if a homeowner hires a bulldozer and operator to help build a driveway, and directs the operator as to where to place the excess dirt, he would have the same control over the operator as the Corps of Engineers had over McKelvy in this case. However, no one would contend that the homeowner must reimburse the owner of the bulldozer when the operator negligently lands upon a rock and damages the machine. Compare Restatement (Second), Agency § 227, illus. 1, 2. That is exactly what is being contended here, and we submit that this result cannot stand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed with directions to enter judgment for the defendant.

Respectfully submitted,

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MAY 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Stephen R. Felson

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AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

STEPHEN R. FELSON, being duly sworn, deposes and says:

That on May 31, 1968, he caused three copies of the foregoing Brief for Appellant to be served by air mail, postage prepaid, upon counsel for the appellee:

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Subscribed and Sworn to before me this 31st day of May, 1968.

Audrey Anne Crump
NOTARY PUBLIC

My Commission expires August 31, 1971

[SEAL]